Summary: Defendants moved to dismiss plaintiff's claims of chiropractic malpractice and loss of chance, asserting they had no duty as a matter of law to either diagnose plaintiff's cancer or refer plaintiff to a medical doctor, and, in any event, there no evidence to suggest the alleged breach of their duties was the proximate cause of any harm she had suffered. The court determined that the standard of care for chiropractors in North Dakota was similar to the standard for physicians. Concluding there were issues of fact as to whether any care provided by the defendants breached this standard, the court denied the motions. The court also stated that it may be possible under North Dakota law to prove recoverable damages if it can be demonstrated that plaintiff's chances of living longer would have been increased by earlier detection of the cancer and there is some reasonable basis for estimating the damages.

Case Name: Ford v. Peters, et al.
Case Number: 1-04-cv-76
Docket Number: 43
Date Filed: 5/5/05
Nature of Suit: 362

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Marion Ford, Plaintiff, vs. Timothy Peters, D.C., Michelle Ouellette, D.C., and Peter's Chiropractic, P.C., a North Dakota Corporation, doing business as Chiropractic Health Center of Dickinson, Defendants.	)	**ORDER RE PENDING MOTIONS FOR SUMMARY JUDGMENT** Case No. A1-04-076

This is an action by plaintiff for chiropractic malpractice. Before the court are the joint motions for summary judgment by defendants Timothy Peters, D.C. and Peter's Chiropractic,

P.C. [collectively "Dr. Peters"] (Doc # 28) and the motion for summary judgment by defendant Michelle Ouellette, D.C. (Doc # 32) ("Dr. Ouellette").

I. BACKGROUND

Plaintiff moved to North Dakota in the fall of 2002 to take a job as librarian at Dickinson State University. Prior to moving to North Dakota, plaintiff had previously received chiropractic treatment approximately 5-6 times a year dating back to 1994 for pain either in her upper back and neck or in her low back.

Plaintiff was diagnosed with breast cancer in about May 2001 and underwent a double mastectomy at that time. When she moved to North Dakota in the fall of 2002, she started seeing Dr. Ferdinand Addo, a Bismarck oncologist, for periodic checkups. At that point, plaintiff's cancer was believed to be in remission.

Plaintiff first saw Dr. Addo on October 22, 2002, and then again on November 27, 2002. On both dates, Dr. Addo performed an examination of the spine, sternum, and pelvis that consisted of tapping on the bones for spot tenderness. Plaintiff reported no unusual muscular-skeletal pain. No diagnostic imaging was performed.

Plaintiff first saw Dr. Peters at the "Chiropractic Health Center" on January 16, 2003. She filled out a patient questionnaire in which she stated that the reasons for her visit were "compressed mid-back, scoliosis lumbar, and painful lower." She reported that the pain in the low-back, sacrum area was a "sharp pain" and that the mid-back pain was of the "aching" variety. She stated her hips would get locked during the night, which she reported was "very painful" – underlining the word "very" twice. She also indicated the pain had been going on for

some time, was getting worse, and was interfering with her sleep. She also reported her history of cancer.

There is a substantial dispute over the extent of the examination and treatment on this first visit. Plaintiff claims Dr. Peters was treating a number of persons simultaneously and that he saw her for only about five minutes, hooked her up to a vibrating machine for a brief period, and made no real examination. She also claims Dr. Peters told her he had as much medical education as any medical doctor as part of a conversation about chiropractic treatment. Most of this is disputed by Dr. Peters. Plaintiff also states that Dr. Peters indicated her pain was probably related to her condition of scoliosis of the lumbar, for which she had previously been treating since 1994.

Plaintiff returned to see Dr. Peters on January 27, 2003. Again, there is a dispute as to the nature and extent of the examination and treatment. Plaintiff's evidence is that she again complained about sharp, intense pain that would come and go in the sacrum area and also reported pain that radiated into her neck and across her shoulders. Plaintiff claims that Dr. Peters spent about fifteen minutes with her on this visit hooking up electrodes, performing an adjustment, and giving her a massage, but, according to her, conducted no real examination.

Plaintiff returned on February, 12, 2003, but Dr. Peters was not in on this date so she was seen by Dr. Ouellette. Defendants claim their practices are separate, but this is disputed. The building out of which Dr. Peters and Dr. Ouellette practice is controlled by Dr. Peters. Dr. Ouellette pays monthly rent that covers use of a common entrance, waiting room, use of staff, and some shared equipment. The monthly rent also covers the use of her own separate examination and treatment rooms that are located off of the shared waiting room opposite the

examination and treatment rooms used by Dr. Peters. The shared staff maintains separate patient files and calendars for the two doctors, but, if one doctor is not available, they will direct patients to the other. The billing statements for both contain a letterhead that states "Chiropractic Health Center" in bold letters at the top and that does not distinguish between the two practices.

When plaintiff was referred to Dr. Ouellette in Dr. Peters's absence, staff pulled the patient questionnaire out of Dr. Peters's file and had plaintiff initial and redate a copy so she did not have to fill out a new one. At that point, the practice of the two doctors was not to look at the rest of each other's medical file unless they obtained a signed consent form from the patient. It appears this was a recent change in practice due to the passage of new federal privacy laws. Prior to that time, there is some suggestion they would refer to each other's files, which apparently were kept in the same general area by the same staff. There is evidence that plaintiff was unaware that Dr. Ouellette did not have full access to all of her patient records maintained at the Chiropractic Health Center.

The redated patient questionnaire presented to Dr. Ouellette included the references to the complaints of intense pain that plaintiff presented to Dr. Peters in January, including the indication of night pain. According to plaintiff, she advised Dr. Ouellette that she continued to have pain in the lumbar and sacroiliac joint ("SI joint") area, particularly in the morning, with secondary pain in the upper back, and that this persistent pain had been aggravated by recent falls on ice including one two days prior. Dr. Ouellette administered a chiropractic adjustment based on a diagnosis of segmental dysfunction and sprain strain (soft tissue injury). Dr. Ouellette recommended plaintiff return in a couple of days if she was not feeling better and plaintiff's understanding was that she should return to Dr. Peters.

Plaintiff did not immediately return. Her next visit was on April 29, 2003, at which time she saw Dr. Peters. Again she complained about pain in the SI joint area, which she indicated had intensified within the last three weeks. The portion of the record made available to the court is less than clear as to what happened during the interval between the visit with Dr. Ouellette on February 12, 2003, and this visit, but it appears plaintiff had some reconstruction surgery during this time frame and was taking pain medication that provided interim relief. Also, during this time frame, plaintiff missed a scheduled appointment with Dr. Addo.

Plaintiff claims she asked Dr. Peters during the visit on April 29, 2003, about an x-ray because she was concerned that the pain in the SI joint area was not going away and that it might be caused by something other than condition for which she had been receiving treatment for years and for which she had been getting relief after treatment. She claims Dr. Peters advised that her reports of pain did not sound like either a fracture or cancer that he was certain it was related to the scoliosis, and that what she needed to do was to come in more often for treatment. There is evidence that Dr. Peters attempted an adjustment on this visit, but was unsuccessful because he could not get anything to move. Plaintiff claims Dr. Peters also did acupuncture on this visit or during her last visit with Dr. Peters on January 27, 2003.

Plaintiff returned to Dr. Peters on May 29, 2003. Plaintiff claims the pain was so bad that she insisted Dr. Peters take an x-ray. Although Dr. Peters disputes plaintiff's account of what was said during the examination, an x-ray was taken on that date and Dr. Peters reviewed the x-ray with her. Dr. Peters's conclusion was that the x-ray showed sublaxations in the lumbar and thoracic spine areas, as well as, scoliosis and that there did not appear to be any fracture. Plaintiff claims Dr. Peters also indicated to her that he was "one hundred percent certain" she did

not have cancer; that her problem was definitely scoliosis of the lumbar, which she simply would have to live with; and that the only way she could get on top of the problem was to be more diligent in returning for treatment. This is disputed by Dr. Peters.

Plaintiff was asked in her deposition why she did not go to Dr. Addo and insist that he take an x-ray. Her response was that she thought she was seeing "a spine specialist, somebody who dealt with spines all day long . . . ."

Plaintiff claims she felt good during the treatment administered on May 29, 2003, but the pain immediately returned so she went back the next day, May 30, 2003, for another round of treatment. She also returned for more treatment on June 5, 2003, and June 12, 2003. During this time frame, plaintiff reported the pain in her SI joint area was very intense - about seven or eight on a scale of 10 - and so bad that there were days she could not stand for long periods and days she could hardly walk because of the intensity of the pain. There is some question whether she reported some improvement in the pain when she returned on June 12, 2003.

The portions of the record made available to the court are unclear as to the reasons why, but plaintiff did not return to Dr. Peters after June 12, 3003, and her next reported visit to a chiropractor is not until December 2003. During this interval, there is evidence that plaintiff obtained some relief from her pain by taking leftover pain medication that she received from a friend and also pain mediation prescribed following additional reconstructive surgery in October. Plaintiff stated that her pain during this period would come and go, varying between one or two and eight on a ten-point scale. Also, during this interval, plaintiff saw Dr. Addo twice. The first time was on June 25, 2003. Plaintiff's back pain was discussed, but plaintiff's evidence is that she indicated to Dr. Addo that she had been treating with Dr. Peters, that he had taken an

x-ray, and that the x-ray was clear. There is evidence that her back pain on that day was four on a ten-point scale. Dr. Addo again did a physical examination for focal tenderness, which was negative. He did not order any x-rays or other diagnostic imaging tests.

Plaintiff again saw Dr. Addo on November 11, 2003, and related a recent history that included memory lapses, some speech impediment, and problems with balance. She reported no significant back pain on that day. In her deposition, she attributed the lack of back pain to the pain medication she was still taking following reconstruction surgery in October. On that occasion, Dr. Addo did order an MRI of the brain, which showed no evidence of abnormality.

On December 11, 2003, plaintiff went to Dickinson chiropractors Dr. Byron Knutson with the same complaints of severe, constant pain in the SI joint area, that she believed had been aggravated by a recent fall on ice. Plaintiff states she discussed with Dr. Knutson her history of prior chiropractic treatment for scoliosis, her history of cancer, and the fact Dr. Peters had taken x-rays and had concluded her back pain was not related to cancer. She also stated that Dr. Knutson discussed the need for an MRI if she did not improve after a couple of weeks of treatment. Dr. Knutson's account of the discussion on the first visit matches fairly closely plaintiff's account, including that Dr. Peters had ruled out cancer and the discussion about the need for an MRI if she did not soon see improvement.

Dr. Knutson administered chiropractic treatment that included use of an activator gun on the first visit and again on December 13, 2003. At that point, it appears Dr. Knutson had made no definitive diagnosis, but that he believed the problem most likely was sublaxations of the spine, a sprain or strain, or possibly a disc problem. He indicated he did not believe the problem was scoliosis because that condition was at most slight. He testified he also considered the

possibility of cancer based on plaintiff's history, but stated he believed this to be a lesser possibility at that point, in part, because of what plaintiff had relayed to him about Dr. Peters's conclusions and the immediate report of the fall on the ice. On that visit, plaintiff advised Dr. Knutson that she would be gone for the upcoming holidays.

Plaintiff went to California for the Christmas holidays. While she was there, she saw the chiropractor whom she had previously treated with prior to moving to North Dakota. Plaintiff stated she advised her old chiropractor that she was treating in North Dakota, that x-rays had been taken that were clear, and that she likely would be getting an MRI when she returned. Her old chiropractor administered treatment consistent with her earlier diagnosis of plaintiff.

Plaintiff returned to Dr. Knutson on January 21, 2004. She reported her continued pain in the SI joint area as seven on a ten-point scale and that the pain was dull, sharp, and constant, but that she had gotten some relief from his prior treatment. Dr. Knutson testified that, because there had not been significant improvement since he last saw her, he talked with plaintiff again about an MRI if she did not improve after a two-week trial of care. At that point, Dr. Knutson testified he was leaning toward a disc problem being the underlying cause of the continued pain, although cancer was still a possibility.

Over the next few days plaintiff returned for two more chiropractic treatments. When there was no improvement, the decision was made not to wait the two weeks and an MRI was ordered on January 26, 2004. The MRI disclosed the existence of possible metastatic disease in the SI joint area and led to further testing that resulted in a definitive diagnosis that plaintiff's cancer had returned and had spread to the spine.

After the cancer was detected, plaintiff obtained the x-rays taken by Dr. Peter on May 29, 2003, and took them to Dr. Addo. She states Dr. Addo advised that the x-rays showed evidence of an abnormality and that an MRI should have been ordered immediately. Plaintiff subsequently filed this action.

Plaintiff has presented evidence: that the bone cancer was likely present when she was first seen by Dr. Peters in January 2003; that the x-rays taken by Dr. Peters on May 29, 2003, showed signs of an abnormality that a trained chiropractor should have recognized required further investigation; and that, if more sophisticated diagnostic imaging had then been done in this time frame, the cancer likely would have been detected. This evidence is disputed by the defendants. In particular, there is evidence that the presence of bowel gas in the x-ray makes questionable any determination of an abnormality.

Plaintiff has also proffered opinions from two chiropractic experts who state that Dr. Peters's care was below the standard of what would be expected of a chiropractor under these circumstances. The same opinion is also expressed by one of the experts as to Dr. Ouellette.

II. ANALYSIS

A. Standard of Review

The standard of review in this case is a familiar one, which, succinctly, is described by the Eighth Circuit as follows:

> Summary judgment is appropriate only when the pleadings, depositions and affidavits submitted by the parties indicate no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The party seeking summary judgment must first identify grounds demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Such a showing shifts to the non-movant the burden to go beyond the pleadings

> and present affirmative evidence showing that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Ind. Co., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d (1986). The non-movant "must show there is sufficient evidence to support a jury verdict in [her] favor." Nat'l Bank of Commerce v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir.1999). "Factual disputes that are irrelevant or unnecessary will not be counted," Anderson, 477 U.S. at 248, 106 S.Ct. 2505, and a mere scintilla of evidence supporting the nonmovant's position will not fulfill the non-movant's burden, id. at 252, 106 S.Ct. 2505.

Uhiren v. Bristol-Meyers Squibb Company, Inc., 346 F.3d 824, 827 (8th Cir. 2003).

B. Dr. Peters's motion to dismiss on grounds of lack of duty

Dr. Peters argues he had no duty as a matter of law to either diagnose plaintiff's cancer or suggest at any point she see a medical doctor. The court agrees with the first part of Dr. Peters's argument, but not the second.

In support of his no-duty argument, Dr. Peters relies primarily upon cases from Wisconsin and Michigan. However, the Michigan authority is somewhat questionable in that the Michigan Supreme Court vacated a substantial portion of a lower court opinion relied upon by Dr. Peters and reaffirmed that chiropractors do have a duty to advise patients when they recognize, through use of reasonable care and skill, that the ailment being treated is not amenable to chiropractic treatment. Estate of Bradford v. O'Conner Chiropractic Clinic, P.C., 637 N.W.2d 505 (Mich. 2002).

Of the cases cited by Dr. Peters, the only case that comes close to establishing an absolute rule that a chiropractor never has duty to suggest that a patient see a medical doctor is the Wisconsin case of Kerkman v. Hintz, 418 N.W.2d 795 (Wis. 1988). This appears to be a distinct minority position, and for reasons expressed below, there is no reason to believe the

North Dakota courts would follow this rule. Further, even under Kerkman, chiropractors do have a duty to advise patients when a condition is not amenable to chiropractic treatment and cease treatment.

In the alternative, Dr. Peters argues that chiropractors have no duty to suggest medical consultation so long as they are treating the patient for a "chiropractic condition." Dr. Peters's argument is essentially this: state law restricts chiropractors to diagnosing and treating "chiropractic conditions,"*e.g.*, spinal sublaxations and muscle inflammations; therefore, chiropractors should not be expected to suggest medical consultation because to do so would require recognition of medical conditions, which is beyond their expertise and authorized practice. From this, Dr. Peters argues he is entitled to summary judgment because it is undisputed (in his view) that he was at all times treating plaintiff for a "chiropractic condition."

For reasons explained below, the court rejects this no-duty argument, as well. However, even if the court was to follow Kerkman, or the argument that there is no duty to suggest medical consultation so long as the chiropractor is treating a "chiropractic condition," Dr. Peters would still not be entitled to summary judgment when the evidence is construed most favorably for plaintiff. There are two reasons why this is so. First, plaintiff alleges that Dr. Peters affirmatively represented to her that the x-rays taken on May 29, 2003, indicated no evidence of cancer. Dr. Peters disputes that this conversation occurred, but this is a jury issue.[1] Assuming, as the court must, that it did occur, Dr. Peters cannot have it both ways: he cannot claim he had no duty to plaintiff, premised upon an argument he is not authorized to diagnose medical

[1] As noted the background section, Dr. Knutson testified that plaintiff had told him Dr. Peters had taken x-rays and had ruled out cancer. This was before the cancer was detected and any lawsuit filed.

conditions, and then claim he has no responsibility for having made what, by his own argument, is a medical diagnosis outside the area of his expertise. Not surprisingly, Dr. Peters offers no authority for this novel proposition.

Second, construing the medical evidence in plaintiff's favor, there did come a point in time during Dr. Peters's treatment when the underlying condition producing plaintiff's pain was most probably caused by plaintiff's cancer and not a chiropractic condition. Consequently, even under Dr. Peters's narrow view of duty, there is a fact issue regarding whether he should have recognized either that the underlying condition was not a chiropractic one and, as a consequence, advised plaintiff to see a doctor, or, following Kerkman, simply discontinued treatment, which likely would have resulted in plaintiff consulting a physician.

Most courts, however, hold that the duties of chiropractors to their patients are broader than as suggested by Dr. Peters and include: (1) a duty to exercise reasonable care in the diagnosis and treatment of their patients, including reasonable care in determining whether chiropractic treatment is appropriate in a particular situation, and (2) a duty to suggest medical consultation when it is clear that the underlying condition is not amendable to chiropractic treatment. See e.g., Goodmand v. Holder, 1990 WL 312759 *2 (Penn. Ct. of Common Pleas 1990); Roberson v. Counselman, 686 P.2d 149, 152 (Kan. 1984); Mostrom v. Pettibon, 607 P.2d 864, 867 (Wash. Ct. App. 1980); Salazar v. Ehrman, 505 P.2d 387 (Colo. App. Ct. 1972); Hansen v. Isaak, 19 N.W.2d 521, 522 (S.D.1945); Howe v. McCoy, 298 P. 530 (Cal. Ct. App., 4th Dist. 1931); Nelson v. Dahl, 219 N.W. 941, 942 (Minn. 1928); see generally Annot. Liability of Chiropractors and Other Drugless Practitioners for Medical Malpractice 77 A.L.R.4th 273, §§ 2-3. Further, in most of these jurisdictions, the standard of care is generally defined with its scope

determined by expert testimony as to the standard of care appropriate under the circumstances of the particular case. See id.

Since this is a diversity jurisdiction case, North Dakota law must control the court's analysis. See Bockelman v. MCI Worldcom, 403 F.3d 528, 530 (8th Cir. 2005). However, there does not appear to be any reported North Dakota decisions that have addressed the issue of duty of chiropractors. In this situation, the court's obligation is to make a prediction of what North Dakota law is based upon "relevant state precedent, analogous decisions, considered dicta, ...and any other reliable data." Id., quoting BoBass v. Gen. Motors Corp., 150 F.3d 842, 846-47 (8th Cir.1998). While the North Dakota courts have not addressed the issue in the context of chiropractors, the North Dakota Supreme court has addressed the same issue for other healthcare professionals who are not physicians, such as dentists and optometrists. In those cases, the court has held that the duties of these professionals are analogous to that of physicians. E.g., Koapke v. Herfendal, DDS, 2003 ND 64, ¶ 13, 660 N.W.2d 206 (dentists); Heimer v. R.A. Privratsky, 434 N.W.2d 357, 359-360 (N.D. 1989) (optometrists).

The standard of care imposed upon physicians in North Dakota is the duty to use the reasonable care, diligence, and skill as ordinarily possessed and expected of physicians. The duty is a general one. In any particular case, the scope of the duty is, most often, established by expert testimony as to the standard of care that is appropriate to the particular circumstances of the case. E.g., Greenwood v. Paracelsus Health Care Corp. of North Dakota Incorporated Corporation, 2001 ND 28, ¶ 13, 622 N.W.2d 195; Winkjer v. Herr, 277 N.W.2d 579, 583-585 (N.D. 1979).

In Heimer, the North Dakota Supreme Court held that, while an optometrist is not a physician or surgeon, the duty of an optometrist, as a primary healthcare provider, is essentially

the same as those of physicians and surgeons, and that the scope of the duty should be determined in a particular case in the same manner. The court stated the following:

> Although an optometrist is a professional health-care provider, he is not a physician. Therefore, Section 28-01-46 is inapplicable in an action against an optometrist for professional negligence.
>
> However, the legislative history of Section 28-01-46 (H.B. 1619, 1981 Legislative Assembly) does not indicate an intent to limit the requirement of expert witnesses to professional negligence actions involving physicians, nurses, and hospitals, nor does it reveal an intent to expand the definition of "physician." Rather, the legislative history indicates that Section 28-01-46 is designed simply to minimize frivolous claims against physicians, nurses, and hospitals. Thus the fact there is legislation requiring expert testimony in actions against physicians, nurses, and hospitals indicates no intent on the part of the Legislature to restrict the necessity of expert testimony to actions involving only those three. *See, e.g., Wastvedt v. Vaaler*, 430 N.W.2d 561 (N.D. 1988) [expert testimony required in legal malpractice actions].
>
> Therefore, although Section 28-01-46 does not apply on its face to an optometrist, our holding in *Winkjer v. Herr* does. In *Winkjer*, 277 N.W.2d at 583, we stated that in order to present a prima facie case of medical malpractice, and thus avoid summary judgment, one must generally establish "the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of." We further stated:
>
> > "Evidence as to the degree of care and skill required of a physician in diagnosing or treating one's ailment, as well as any departure from that standard, must generally be established by expert testimony. . . . Thus one claiming medical malpractice cannot ordinarily have his case submitted to a jury without expert testimony supporting his claim of professional negligence." 277 N.W.2d at 585.
>
> An optometrist is one who is engaged in "the evaluation of disorders of the human eye and the examination, diagnosis, and treatment thereof, together with its appendages." Sec. 43-13-01(2), N.D.C.C. Optometry is a primary health-care profession. *Id*. There are strict legal and educational prerequisites that must be complied with in order to practice optometry. See Chapter 43-13, N.D.C.C. Therefore, the liability of an optometrist is to be tested by standards analogous to the standards of physicians and surgeons. See also *Tempchin v. Sampson*, 262 Md. 156, 277 A.2d 67 (1971); *Dolan v. O'Rourke*, 56 N.D. 416, 217 N.W. 666 (1928).

> Having decided that the standard of care of an optometrist is to be measured the same way as the standard of care of physicians and surgeons, i.e., whether the optometrist exercised the reasonable care and skill normally exercised by optometrists, it is a simple and logical step to conclude that expert testimony is generally required in actions against optometrists for professional negligence.

434 N.W.2d at 359-360.

There is no reason to believe the North Dakota Supreme Court would come to a different conclusion and adopt some other rule for chiropractors. Like optometrists and dentists, chiropractors are primary healthcare providers; they are professionals; and they must comply with strict legal and educational requirements to practice chiropractic, including possessing a license and being subject to disciplinary action for unprofessional conduct. Consequently, the court concludes that the duty of chiropractors under North Dakota law is to exercise the reasonable care, diligence, and skill as ordinarily possessed and expected of chiropractors.

The issue then becomes what is the appropriate standard of care under the particular circumstances of this case. Construing the disputed facts in plaintiff's favor, there is evidence upon which the jury could find that Dr. Peters did commit one or more breaches of an appropriate standard of care - aside from the affirmative representations that plaintiff claims Dr. Peters made about the absence of evidence of cancer in the x-rays taken on May 29, 2003, which the court believes are actionable no matter what standard of duty is adopted.

One of the possible breaches relates to the May 29, 2003, x-rays taken by Dr. Peters. All of the nonparty healthcare professionals (both chiropractic and medical) who have reviewed the x-rays have indicated there is present evidence of an abnormality that is suggestive of the possibility of metastatic disease and that, in any event, required further investigation. Both of plaintiff's retained chiropractic experts have opined that Dr. Peters should have recognized the

abnormality, understood it was suggestive of possible metastatic disease, and made a medical referral. The court believes this is sufficient to create issues for the jury as to whether Dr. Peters should have considered the possibility of cancer as a cause of plaintiff's pain (a condition not amenable to chiropractic treatment) and examined the x-rays in this light, whether he should have detected the presence of the abnormality, and whether he should have made a medical referral, or, at the very least, pointed out the possible significance of the abnormality to plaintiff and suggested she take the x-rays to a medical doctor.

Also, aside from the x-rays, there is evidence from which the jury could conclude that Dr. Peters should have recognized, at some point during his care of plaintiff, that the pain in the SI joint area was caused by something other than a "chiropractic condition," particularly given plaintiff's medical history, the persistence and intensity of the reported pain, and his apparent lack of success in treating the pain.

By suggesting Dr. Peters may have had an obligation to do these things, does not mean that he will be held to the same standard of care as a medical doctor, nor does it impose the duty of making medical diagnoses.[2] It merely imposes some responsibility for being able to recognize abnormalities and warning signs in the body parts being treated that suggest the complained about symptoms may be caused by a condition that is not amendable to chiropractic treatment

[2] While concluding there are jury issues as to the appropriate standard of care, the court does not hold that Dr. Peters, in fact, breached any particular standard of care and expresses no opinion regarding the strength of plaintiff's case other than to observe that there are number of things that the jury might be concerned about, including plaintiff's prior history of chiropractic treatment for "chiropractic conditions," the fact plaintiff was seeing an oncologist during the same time frame who did not diagnose the cancer, the perceived reasonableness of plaintiff demanding that Dr. Peters take an x-ray to rule out cancer and the lack of the same demands being made upon plaintiff's oncologist, the possible presence of confounding bowel gas in the x-rays taken by Dr. Peters, etc.

and so advising the patient. Further, in imposing this responsibility, the test is not what abnormalities or warning-signs a medically-trained oncologist or radiologist would recognize, but rather it is those abnormalities and warning-signs that would be recognized by a chiropractor exercising reasonable care, diligence, and skill as ordinarily possessed and expected of chiropractors.

The court recognizes that implicit in any finding by a jury that Dr. Peters violated one or more of the standards of care suggested by plaintiff's evidence is that Dr. Peters is expected to have some minimal knowledge of medical matters relating to the body parts (in this case the spine) that he is authorized to treat and to have some ability to read x-rays. Counsel for Dr. Peters suggests this necessarily requires Dr. Peters to practice medicine, which is beyond his expertise and allowed area of practice, and that, for this reason, there can be no duty. The court disagrees.

There is a difference between chiropractors making affirmative medical diagnoses and chiropractors making judgments as to whether chiropractic treatment is appropriate in a particular situation. Not surprisingly, and for the consuming public most reassuringly, the evidence is that chiropractors do receive medical training that allows them to make intelligent judgments with respect to the latter. In fact, all of the chiropractors who have testified in this case, including the two defendants, have indicated they receive training in reading x-rays, including looking for abnormalities that may be suggestive of metastatic disease. Further, they have all testified they are trained to look for certain clinical signs of bone cancer when performing examinations.

Finally, there is nothing in North Dakota law governing the practice of chiropractors that prohibits them from recommending that patients consult with medical professionals. Further, it is clear from North Dakota's statutory scheme that chiropractors are expected to have some medical knowledge and the ability to read x-rays, so that they can properly perform their responsibilities as licensed, healthcare professionals.

N.D.C.C. § 43-06-01(2) defines the "practice of chiropractic" to include:

> a. The examination, evaluation, and diagnosis by means including X-ray, other appropriate diagnostic imaging, clinical laboratory procedures, or pertinent examinations taught by chiropractic colleges accredited by the council on chiropractic education or its successor . . . .

As previously noted, chiropractic schools do teach some medicine, including, pertinent to this case, what to look for in spinal x-rays that may be suggestive of bone cancer and also clinical signs of cancer, such as, persistent intense pain and night pain.

Also, N.D.C.C. § 43-06-10 requires that the North Dakota examination for licensing cover the following subjects: anatomy; physiology; diagnosis; nutrition; nonsurgical orthopedics; chemistry; pathology; public health; neurology; chiropractic jurisprudence; chiropractic philosophy, ethics, adjusting, and patient management as taught by approved and accredited colleges of chiropractic; and X-ray and diagnostic imaging. And, upon being licensed, chiropractors are authorized to refer to themselves as "doctors of chiropractic"or "chiropractic physicians" under § 43-06-11 and are authorized to practice in any public or private hospitals in the state under § 43-06-17. In fact, they are even authorized to sign certificates of public health, including birth and death certificates, under § 43-06-16.

Based on the professional status accorded chiropractors under North Dakota law and the breadth of their training, the North Dakota Supreme Court has concluded that "the practice of chiropractic is the practice of medicine, although in restricted form. . . ." Klein v. Harper, 186 N.W.2d 426, 431 (N.D. 1971). And, consistent with this view, the court has permitted chiropractors to testify in medical malpractice actions against physicians regarding matters within the area of the chiropractors' expertise and to give expert opinions, to a reasonable degree of medical certainty, as to the permanency of injuries in the areas of the body they are authorized to treat. Klein v. Harper, 186 N.W.2d at 429-431 (medical opinion regarding permanency of spinal injury); Ness v. Yeomans, 234 N.W. 75, 76-77 (N.D. 1931) (interpretation of x-rays in a medical malpractice action).

C. Dr. Peters's motion to dismiss on grounds of lack of proximate cause

More troublesome for plaintiff is Dr. Peters's proximate cause argument that plaintiff was simultaneously under the care of Dr. Addo, an oncologist, who plaintiff was seeing for periodic checkups with respect to her breast cancer, which was believed to be in remission. Nonetheless, construing the evidence most favorably for plaintiff, a reasonable jury could conclude that Dr. Addo would have diagnosed the presence of the cancer earlier if he had been given the x-rays taken by Dr. Peters that arguably show the presence of the abnormality requiring further investigation. Also, the jury could conclude that Dr. Addo would have been more aggressive in terms of ordering additional diagnostic imaging if it had been reported to him that Dr. Peters (who he understood was treating plaintiff for her back pain) had concluded the pain was not amenable to chiropractic treatment. Finally, the jury could conclude that Dr. Peters's alleged affirmative representations, that plaintiff confronted a chiropractic problem and that there was no

evidence of cancer, led plaintiff to believe she had no reason to explore the matter further with Dr. Addo. See Mostrom v. Pettibon, 607 P.2d at 869 (alleged misrepresentations by a chiropractor may have led plaintiff into thinking there was no need to mention a problem to the physician he was also seeing).

D. Dr. Ouellette's motion for summary judgment

Dr. Ouellette, in part, moves to dismiss for lack of duty based on the same arguments made by Dr. Peters that no duty was owed as matter of law, citing to the same Wisconsin and Michigan cases. The foregoing discussion disposes of that part of Dr. Ouellette's motion.

Dr. Ouellette also moves to dismiss on the grounds that there is insufficient evidence upon which the jury could find proximate cause between any alleged breach of standard of care on her part and any harm suffered by plaintiff. Given the limited record, the court is not prepared to say now that no reasonable juror could find proximate cause between a possible breach of a standard of care by Dr. Ouellette and the possibility of an earlier diagnosis of the cancer. There is evidence from which the jury could conclude that cancer was present by the time of Dr. Peters's first two examinations, along with clinical warning-signs as to the possible existence of the cancer. There is also evidence that a more objective indication of possible cancer was present in the x-rays taken on May 29, 2003, and that the cancer was detectable at that time with more sophisticated diagnostic imaging. While the record is not entirely clear as to what more sophisticated diagnostic testing would have indicated two months earlier, the inference from Dr. Wagnsness' report is that it was detectable at that time, as well.

The time line here is simply too compressed for the court to decide the issue of proximate cause as a matter of law. Consequently, the court is going to deny - at least for now - the second part of Dr. Ouellette's motion for summary judgment of dismissal.

Having reached these conclusions, the court believes it prudent to address a matter that has been raised, but not directly dealt with by the foregoing dispositions. Dr. Ouellette correctly points out that no claim has been made against her for vicarious liability. Further, the court does not believe that sufficient evidence has been presented that would make her vicariously responsible for any fault that may be attributed to Dr. Peters, even if such claim had been made. Consequently, for whatever assistance this may be to the parties, the court's view of the evidence presented so far is that Dr. Ouellette's responsibility began and ended on the day she saw plaintiff.

This being the case, the court has serious doubts about whether a reasonable jury could conclude that Dr. Ouellette breached a standard of care. Dr. Ouellette saw plaintiff only one time, essentially substituting for Dr. Peters who had the day off. On that occasion, plaintiff had fallen on ice two days prior and presented herself to Dr. Ouellette complaining about symptoms that arguably were consistent, at least in part, with the fall on ice. There is also evidence that Dr. Ouellette treated plaintiff based on the symptoms consistent with the most recent fall and suggested she return in a couple of days if she did not feel better. Based on this, a jury could reasonably conclude the treatment rendered by Dr. Ouellette was appropriate under the circumstances, particularly if the jury concludes she was substituting for Dr. Peters, and, even more particularly, if the jury accepts Dr. Ouellette's testimony as true that she would have

discussed the possibility of cancer with plaintiff because that was her standard practice (habit) in cases in which the patient had a history of cancer.

On the other hand, a jury could conclude that Dr. Ouellette should have reviewed the records of Dr. Peters's prior diagnoses and treatment, including obtaining plaintiff's consent for that review. The jury could come to this conclusion based upon the particular arrangement that existed between Dr. Peters and Dr. Ouellette and the fact it would have simply involved the same staff person pulling the rest of Dr. Peters's file who pulled plaintiff's patient history for redating and presentation to Dr. Ouellette. And, to the extent plaintiff's consent was required, the jury could easily conclude it likely would have been given. Further, the jury could reasonably conclude that a patient, who had not been advised differently, would assume that Dr. Ouellette had access to the complete file.[3]

Viewed in this light, plaintiff's visit with Dr. Ouellette is the third time she has sought treatment in approximately a one-month time frame complaining of persistent and severe pain (albeit aggravated by the most recent fall), including night pain, which are warning signs of cancer or other conditions not amenable to chiropractic treatment. It is within this time frame that plaintiff's chiropractic experts opine that more rigorous diagnostic testing and consideration of alternative causes were required.

Also, as noted in the background section, plaintiff sought treatment twice from chiropractor Dr. Byron Knutson in December 2003. During the first visit, Dr. Knutson indicated that an MRI would be appropriate if his treatment did not provide plaintiff with significant relief.

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[3] The same is true in terms of the jury concluding that Dr. Peters should have reviewed the treatment records of Dr. Ouellette when he next saw plaintiff in April 2003.

Dr. Knutson's treatment was interrupted while plaintiff left the state for the Christmas holidays. When plaintiff returned for a third time on January 21, 2004, Dr. Knutson advised plaintiff that she needed to consider an MRI if she did not see significant improvement in the next two weeks. In that regard, Dr. Knutson's course of treatment is roughly consistent with the standard of care suggested by plaintiff's retained experts, particularly since he was under the impression that Dr. Peters had within the last six months, or so, taken x-rays that did not reveal any sign of cancer.

Nonetheless, the court is troubled by the fact that only one of plaintiff's expert chiropractors expressed an opinion, at least explicitly, regarding Dr. Ouellette's care and by the summary nature of his opinions. While barely enough now to create a fact issue as to the standard of care, the same may not be true at trial when the court has the ability to consider the expert opinions in the full context of the actual facts presented.

E. Dr. Ouellette's and Dr. Peters's motions for summary judgment dismissing the claim for "loss of chance"

The court is also denying the motions of Dr. Ouellette and Dr. Peters to dismiss the claim for loss of chance - at least at this point. The court believes that a decision on the issue of recoverable damages would be better made on a more complete record, particularly given the complexity of the issue in this case. However, for whatever benefit it may be to the parties now, the court will provide some of its preliminary thinking on this issue.

Based on the present record, the court is skeptical that there is any recoverable claim in this case for "loss of chance"– at least to the extent it is defined as a loss of a chance of "cure" that would allow plaintiff to live to her normal life expectancy or something close to that. On the other hand, the court believes it may be possible to prove recoverable damages if it can be

demonstrated that plaintiff's chances of living longer would have been increased by earlier detection of the cancer (*e.g.,* evidence that earlier detection coupled with aggressive treatment would have slowed its growth) and there is some reasonable basis for estimating the damages. See VanFleet v. Pfeifle, M..D., 289 N.W.2d 781 (N.D. 1980) (suggesting damages could be recoverable when earlier detection of cancer probably would sustain life for a greater number of years); accord Herbert v. Parker, M.D., 796 So.2d 19 (La.App. 4th Cir. 2001).

We spend considerable amounts of money in our society attempting to prolong life, even during late stages when life may not be entirely pleasant. While this is not an appropriate basis for calculating damage, it is indicative of the value we place on human life. Consequently, the court would have trouble saying the probable loss of an extra year of life has no value if, for example, this is what the evidence would reasonably suggest as the likely consequence of the earlier detection of cancer not being made. In concept, this does not seem that much different, nor any more imprecise, than allowing a jury to award damages for aggravation of a pre-existing condition under other circumstances. See e.g., Auster v. Strax Breast Cancer Institute, 649 So.2d 883 (Fla. 4th Dist. Ct. App. 1995); cf. Tuhy v. Schlabz, 1998 ND 31, ¶ 13, 574 N.W.2d 823.

Also, the court believes there may be a basis for damages in this case for any unnecessary pain and suffering that plaintiff may have endured from the time that an earlier diagnosis of cancer might have been made to the time the cancer was diagnosed if an earlier diagnosis likely would have resulted in administration of treatment that could have lessened the pain during that time frame.[4] The report from Dr. Wangsness suggests this to be the case, although the pain may

[4] There may be other recoverable damages the court has not considered.

have been controlled to a degree by the pain medication administered to plaintiff for part of the time period following the reconstruction work, as well as, plaintiff's self-medication.

III. CONCLUSION and ORDER

Based on the foregoing, the joint motions for summary of judgment by defendants Timothy Peters, D.C. and Peter's Chiropractic, P.C. (**Doc # 28**) are **DENIED** and the motion for summary judgment by defendant Michelle Ouellette, D.C. (**Doc # 32**) is **DENIED**.

Dated this 5th day of May, 2005.

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Charles S. Miller, Jr.
United States Magistrate Judge